IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD ALLEN FUSELIER,

Defendant.

07-CR-535-BR

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Defendant Richard Allen Fuselier's Motion (#364) to Withdraw Plea of Guilty. For the reasons that follow, the Court **DENIES** Fuselier's Motion.

BACKGROUND

On December 20, 2007, Fuselier, Joseph Oquendo Saladino, Marcel Roy Bendshadler, Michael Sean Mungovan, and Richard J. Ortt were indicted by a grand jury on one count of Conspiracy to Defraud in violation of 18 U.S.C. § 371. On September 11, 2009, Fuselier entered a plea of guilty to the charge pursuant to a Plea Agreement in which, among other things, he promised to cooperate and to testify truthfully at the trial of his co-defendants.

During the trial in November 2009, Fuselier testified in a manner that the Court perceived to be potentially inconsistent

with his Plea Agreement and his statements during his earlier plea colloquy. After the jury returned its Verdict (acquitting Defendant Ortt, but convicting Defendants Saladino, Bendshadler, and Mungovan), the Court requested the government and Samuel Kauffman, counsel for Fuselier, to review the transcripts of Fuselier's plea colloquy and trial testimony and to evaluate whether there was any reason for concern about the sufficiency of the process that led to Fuselier's guilty plea, particularly with respect to the factual bases of Fuselier's plea in light of his trial testimony and the "deceitful or dishonest means" element of the offense.

On December 3, 2009, Mr. Kauffman advised the Court that he and the prosecutors had considered the Court's inquiry and "remain[ed] satisfied that there was an adequate factual basis for Mr. Fuselier's plea." Nevertheless, Kauffman suggested Fuselier receive a second opinion. Accordingly, on December 17, 2009, the Court appointed Marc Blackman as Fuselier's counsel for the limited purpose of representing Fuselier as to the Court's inquiry concerning his plea and trial testimony.

On March 18, 2010, Mr. Blackman filed on Fuselier's behalf a Motion to Withdraw Plea of Guilty. On April 8, 2010, the Court heard oral argument on Fuselier's Motion during which the Court questioned Fuselier directly to ensure he understood the risks he was facing if the Court granted his Motion, specifically

including the loss of the benefits secured in his Plea Agreement. After Fuselier personally confirmed he understood these risks and, nonetheless, wished the Court to rule on his Motion, the Court took the Motion under advisement.

FACTS

During Fuselier's plea colloquy on September 11, 2009, he testified under oath and, among other things, confirmed as true the following factual bases set out in his Plea Petition:

a. Beginning in 2001 and continuing to about February 2005, I did agree with one or more persons to file and in fact filed tax returns or amended returns with the Internal Revenue Service on behalf clients who were being threatened with criminal enforcement and prosecution for failure to file.

b. The returns and amended returns we filed on behalf of these clients accurately stated the clients' gross income, but asserted the theory that income earned from non-commercial activity (including personal labor or services) did not constitute taxable income.

c. Many of the returns that we filed for these taxpayers were frivolous in that they were filed for the sole purpose of delaying the criminal enforcement actions against the taxpayers, but before we had any reason to believe that the claim was legally valid.

d. At least one of my clients resided or earned income in the District of Oregon.

e. Accordingly, we did conspire to defraud the United States by impeding, impairing, obstructing or defeating the lawful functions of the Internal Revenue Service of the Department of the Treasury and committed at

> least one overt act in furtherance of that conspiracy.

Plea Pet. at ¶ 25.

In connection with his Plea Agreement, Fuselier simultaneously entered into a Cooperation Agreement with the government, which Fuselier confirmed he understood and voluntarily accepted and which provided in pertinent part:

> 1. Information: Defendant agrees to provide truthful and complete information, with no material misstatements or omissions of fact, relating directly or indirectly to any criminal activity. Such cooperation includes producing any and all documents, records, writings, tangible objects, or materials in defendant's possession or control which relate to that criminal activity. Defendant will neither attempt to protect any person or entity who has been involved in criminal activity, nor falsely implicate any person or entity in criminal activity. Defendant agrees to cooperate with any efforts and requests by the USAO to verify that the information provided is truthful and complete.
>
> * * *
>
> 4. Collateral Use: If defendant should testify materially contrary to the substance of the cooperation, or otherwise presents in any legal proceeding a position materially inconsistent with the cooperation, any information or evidence obtained through that cooperation may be used against defendant in any fashion, including as the basis for a prosecution for offenses involving perjury, false declaration before a grand jury or court, false statement, and obstruction of justice.
>
> * * *

> 6. Testimony: Defendant agrees to testify under oath truthfully and completely in any federal or state grand jury, trial, hearing, or any other proceeding to which defendant may be called as a witness.
>
> * * *
>
> 8. Breach of Cooperation: It is expressly understood and agreed by the parties that the determination of whether these cooperation terms have been breached rests exclusively with the USAO, so long as that determination is made in good faith and not arbitrarily. Should the USAO determine that the defendant, after the date of this agreement: (a) has committed any further crime or has violated any condition of release or supervision imposed by the Court (whether or not charged); (b) has given false, incomplete, or misleading testimony or information; or (c) has otherwise breached any condition of this agreement or the Plea Agreement, the USAO will have the right, in its sole discretion, to void this agreement and/or the Plea Agreement, in whole or in part.

Decl. of Marc Blackman, Ex. 1.

At the September 11, 2009, plea proceeding, after reviewing with Fuselier in detail the contents of his Plea Agreement and Plea Petition, the Court requested Senior Litigation Counsel Allan Garten to recite the material elements of the offense and to summarize the evidence the government had to support the charge against Fuselier. In particular, the Court advised Fuselier as follows:

> THE COURT: I need you to listen carefully, now. Mr. Garten is going to review the conspiracy charge in a manner that applies to you, particularly for today.

> He'll describe the material elements. He would have to prove each one of these material elements beyond a reasonable doubt. And all 12 jurors would have to agree he had proved each of the elements beyond a reasonable doubt before you could be found guilty.
>
> This means that if even one juror did not accept the Government's proof on one element, you could not be found guilty. So it's important you are reminded of what it is the Government has to prove.
>
> And then, in just summary terms, he'll describe what evidence the Government has to support the charge.
>
> If he says anything you think is wrong, anything that surprises you, anything you're not certain about, stop, talk with Mr. Kauffman, resolve the issue. Don't plead guilty if you have any questions in your mind. All right?

Blackman Decl., Ex. 2 at 30.

After Fuselier confirmed he understood the Court's statement, the government's counsel described the elements of the charge as follows:

> MR. GARTEN: As to the elements of the crime of conspiracy to defraud the United States pursuant to Title 18 United States Code Section 371, the essential elements are that there was an agreement between Mr. Fuselier and one or more other individuals to obstruct a lawful function of the Government. Here, it would be *to defraud the United States* by obstructing, impeding, impairing, and defeating the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of revenue, namely federal income taxes. And that this was *accomplished through deceitful*

> *or dishonest means*. And at least one of the members of the conspiracy performed at least one overt act in furtherance of the conspiracy.

Blackman Decl., Ex. 2 at 32 (emphasis added). Mr. Garten then recited the following evidence to support the charge against Fuselier:

> MR. GARTEN: [W]e would show -- and we will show at trial of the other co-defendants - that on or about February 1st, 2001, Mr. Fuselier founded Compensation Consultants, which was formed to assist people to evade the assessment or collection of federal income taxes. That one of the programs and the essential program developed by Compensation Consultants and the defendant and co-defendant, Mr. Ortt, was the claim-of-right program. And that the individuals using the claim-of-right program claim false tax reductions equal to the amount of wages or self-employment income earned, effectively eliminating all of their tax liabilities. The Government would show that from time to time various different code sections of the Internal Revenue Service's code were used, and that many of the tax returns also claimed refunds for social security and Medicare taxes that had been paid.
>
> The Government would show and will show that the claim-of-right program was also marketed by an organization founded by co-defendant Joe Saladino, called the Freedom and Privacy Committee.
>
> The Government will show that three of the defendants - - Mr. Mungovan, and Bendshadler, and Mr. Ortt were also involved in the marketing of this fraudulent tax evasion program designed by Mr. Fuselier. And that Mr. Mungovan

was the national sales director for the Freedom and Privacy Committee. Mr. Bendshadler was the independent representative for the [Freedom and Privacy Committee] FPC, and Mr. Ortt -- working with Mr. Fuselier in Compensation Consultants [CC] -- prepared and caused to be prepared fraudulent tax returns using the claim-of-right program.

The Government would show that more than 1,000 tax returns were filed using the claim-of-right program, and that various federal injunctions were ultimately issued against both the Freedom and Privacy Committee and Compensations Consultants. The latter being the organization founded and controlled by Mr. Fuselier.

With respect to Mr. Fuselier's relationship with other Government would show that Mr. Fuselier first had contact with Mr. Saladino in mid-2002, and that Mr. Saladino traveled to New Orleans and met with Mr. Fuselier and Mr. Ortt to discuss the claim-of-right program. The Government would show that Mr. Fuselier provided the claim-of-right program to Mr. Saladino with knowledge that he would use it, although they may have differed on the marketing approach as to how to use it.

The Government would show that Mr. Saladino turned to Mr. Fuselier periodically for advice and counsel about the substance of the claim-of-right program and certain issues related to the implementation and marketing of the claim-of-right program.

The Government would show that Mr. Saladino would forward to Mr. Fuselier various frivolous filing letters that Mr. Saladino's clients would receive from the IRS after filing

tax returns using the claim-of-right program.

The Government would show that Mr. Saladino was a source of clients for Mr. Fuselier, who would refer people to - Mr. Saladino would refer individuals to Mr. Fuselier who were threatened with criminal prosecution and had various problems with the IRS.

The Government would show that Mr. Fuselier trained defendants and I'm just going to focus on two here -- the several nonlawyers, who were called litigators, to work with Mr. Saladino in filing claims against the IRS in court. And in fact Mr. Saladino paid for that training, made those payments to Mr. Fuselier.

The Government would show that Mr. Fuselier also paid for other services he provided, and that we have records showing at least 11 payments, ranging from 200 dollars to 500 dollars during the period September 24th of 2002, through May 5th of 2003.

The Government-would show that Mr. Saladino and Mr. Fuselier discussed various court cases, and that Mr. Saladino would, from time to time, send litigation paperwork to Mr. Fuselier for his review.

The Government would show that Mr. Fuselier would send his news newsletter to Mr. Saladino, and would instruct him on the law. And the Government would show that Mr. Saladino discussed with Mr. Fuselier various court cases, like the *Ledford* [*v. United States*, 297 F.3d 1378 (Fed. Cir. 2002),] decision and the Gary Clark Oregon tax court case [*Dep't of Rev. v. Clark*, No. TC 4604, TC 4605, 2003 WL 22319439 (Or.

> T.C. Oct. 6, 2003)].[1]
>
> The Government would show that Mr. Ortt assisted Mr. Fuselier in researching tax laws and that it was frankly Mr. Ortt's idea to start Compensation Consultants when they had originally had another organization called Tax Protestor Services.
>
> And the Government would show that Mr. Ortt, Mr. Fuselier, and Mr. Saladino worked together and discussed various court filings.
>
> In addition to that, your Honor, the Government would show, as a general means and a manner of how this program was marketed, that it was the claim-of-right which was the central program that really tied together the five defendants named the Indictment.
>
> The Government would show that the claim-of-right program was marketed through weekly conference calls, and conference calls on the claim-of-right program and conference calls on various litigation matters.
>
> The Government would show that the Internet was used as a means of payment, and that Mr. Saladino would instruct people to pay with blank money orders, and that Mr. Saladino paid Mr. Fuselier through the Internet and the EVO cash manner of payment.

Blackman Decl., Ex. 2 at 32-36.

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[1] *Ledford* and *Clark* both involved challenges by taxpayers associated with Compensation Consultants and/or FPC and both rejected the argument on which the claim-of-right program was premised (*i.e.*, that compensation from personal services is not taxable income). *See Ledford*, 297 F.3d at 1381, and *Clark*, 2003 WL 22319439, at *1.

After the government's recitation, the Court engaged in the following colloquy with Fuselier:

> THE COURT: Okay. Mr. Fuselier, sir, let me first ask you, do you understand the conspiracy charge as alleged against you in this 18-page Indictment? Do you have it in mind, or do you need me to read it to you, all 18 pages?
>
> MR. FUSELIER: Yes, your Honor, I understand it.
>
> THE COURT: You do not need me to read it to you?
>
> MR. FUSELIER: No, your Honor.
>
> THE COURT: How do you plead to Count 1, guilty or not guilty?
>
> MR. FUSELIER: Guilty.

Blackman Decl., Ex. 2, at 40. The Court then engaged in the following exchange with Fuselier:

> THE COURT: Sir, I need you to tell me, in your words, what you did that makes you guilty of the charge. You may read to me from your petition, paragraph 25, if you wish, or you may otherwise explain yourself.
>
> MR. FUSELIER: Yes. We agreed to file income tax forms for clients. If they agreed to let us report all of their income, we agreed to file those claims for clients and to -- because they were under threat of criminal action. So we agreed to file those claims for clients.
>
> THE COURT: Is the material that's asserted in paragraph 25, subparagraphs A, B, C, D, and E, in your petition, is all of that factually true?
>
> MR. FUSELIER: Yes, your Honor.

THE COURT: All right. And with respect to the overt acts described in the Indictment, counsel enumerated several of them: 87, 86, 85 - - well, 80 - - I'm looking for the filings. 87, 86 - -

MR. GARTEN: 43, your Honor.

MR. FUSELIER: Yes.

THE COURT: 43. Those are three examples. You acknowledge your participation, as alleged in each of those?

MR. FUSELIER: Yes. I helped each of those people file those claims.

Blackman Decl., Ex. 2 at 40-41.

At the trial of Fuselier's co-defendants, Fuselier's cross-examination by attorneys for two of the co-defendants specifically focused on the "deceitful or dishonest means" element of the offense and included the following testimony:

MS. BENDER: Okay. And so once the - - the prior claim under 1341 had been denied by the U.S. Federal Court of Claims, you then came back with an amendment to the 1040X, alleging this other section. Correct?

MR. FUSELIER: Yes. Yes.

MS. BENDER: And you are in the process of litigating that claim at this point?

MR. FUSELIER: Yes. (Nods head.)

MS. BENDER: All right. And you believed in that claim, I would imagine?

MR. FUSELIER: Well, we're going to litigate it. I believe that you have a right to litigate it.

MS. BENDER: Okay. But you don't believe that you're doing anything dishonest in litigating that claim?

MR. FUSELIER: No.

MS. BENDER: You don't believe you're doing anything to defraud the United States Government, do you?

MR. FUSELIER: No.

* * *

MS. BENDER: Okay. And that the evidence that you created, in preparing all of these tax documents and the - - the -- the matters that you directed Mr. Ortt to do, were all for the purpose of making this nontaxable income claim?

MR. FUSELIER: Yes, they were.

MS. BENDER: Okay. Nothing about it was deceitful. Correct?

MR. FUSELIER: No.

MS. BENDER: Nothing was hidden or concealed from the Government?

MR. FUSELIER: No, nothing was concealed.

* * *

MS. BERGESON: Frivolous, to you, means incomplete. Right?

MR. FUSELIER: Or - - or filed for the purpose of delay.

MS. BERGESON: Right.

MR. FUSELIER: We used the definition in Black's.

MS. BERGESON: And incomplete not in the sense of hiding or omitting but in the sense of unperfected?

MR. FUSELIER: Unperfected, yes.

MS. BERGESON: Or, as you just pointed out, frivolous means filed for the purpose of delay?

MR. FUSELIER: Yes.

MS. BERGESON: All right. It does not mean lying, does it?

MR. FUSELIER: No, it doesn't.

MS. BERGESON: It does not mean deceiving?

MR. FUSELIER: No, it doesn't.

MS. BERGESON: In all of this process, you've never done anything to deceive or to lie, or to intend to do those things, have you?

MR. FUSELIER: I don't think so.

Blackman Decl., Ex. 3, at 175-76, 180, 184-85.

STANDARDS

Federal Rule of Criminal Procedure 11(d)(2)(B) provides a defendant may withdraw a plea of guilty before sentencing if he "can show a fair and just reason for requesting withdrawal." The decision to permit a defendant to withdraw a guilty plea is within the discretion of the trial court. *United States v. Ensminger*, 567 F.3d 587, 590 (9th Cir. 2009). The Defendant bears the burden to establish that withdrawal is warranted. *Id.*

Fair and just reasons for withdrawal include "inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that

did not exist when the defendant entered his plea." *United States v. Garcia*, 401 F.3d 1008, 1011 (9th Cir. 2005)(quotations, citations and emphasis omitted). While the "fair and just" standard is "generous and must be applied liberally," *Ensminger*, 567 F.3d at 590, a defendant cannot withdraw his plea "simply on a lark," *id.* (citations and quotations omitted), or because of "a change of heart." *United States v. Graibe*, 946 F.2d 1428, 1431 (9th Cir. 1991). *See also United States v. Rios-Ortiz*, 830 F.2d 1067, 1069 (9th Cir. 1987). A defendant does not have a "right to withdraw his plea." *Id.*

DISCUSSION

Fuselier moves to withdraw his guilty plea on three grounds: (1) there was an insufficient factual basis for Fuselier's guilty plea and the Rule 11 colloquy was inadequate, (2) Fuselier's testimony at trial established a claim of factual innocence, and (3) there is a "fatal variance" between the conspiracy charged in the Indictment and the conspiracy that formed the factual basis of Fuselier's guilty plea as to the material "deceitful or dishonest means" element of the offense.[2]

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[2] As noted, the Court appointed Blackman solely for the purpose of representing Fuselier as to the Court's inquiry concerning Fuselier's guilty plea and trial testimony. Nevertheless, the Court addresses the additional bases to withdraw the plea raised in Fuselier's Motion to Withdraw filed by Blackman.

I. The plea colloquy was adequate and there was a sufficient factual basis for Fuselier's guilty plea.

As noted, Fuselier asserts the Rule 11 colloquy was inadequate and there was an insufficient factual basis for his guilty plea as to the material, deceitful or dishonest means element of the offense.

A. Standards

The Ninth Circuit has held

> Federal Rule of Criminal Procedure 11 requires judges to determine that a plea has a factual basis. Fed. R. Crim. P. 11. To satisfy this requirement, "[t]he judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." *McCarthy [v. United States*, 394 U.S. 459,] 467 [1969](citation omitted).

United States v. Jones, 472 F.3d 1136, 1140 (9th Cir. 2007). To adequately fulfill the requirements of Rule 11, a trial judge must

> engage in a colloquy with the defendant to confirm that the defendant understands, among other things, "the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G). Before entering judgment on a plea, the court must also "determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). In evaluating the adequacy of a Rule 11 colloquy, we examine solely the record of the plea proceeding itself. *United States v. Kamer*, 781 F.2d 1380, 1383 (9th Cir. 1986). In ascertaining whether a Rule 11 error affected the defendant's substantial rights or the integrity of the proceeding, however, "we may look to other portions . . . of the limited record made in guilty plea cases." *Minore*, 292 F.3d at 1119

> (internal quotation marks, brackets, and citation omitted).

United States v. Covian-Sandoval, 462 F.3d 1090, 1093 (9th Cir. 2006). Thus, when considering whether a factual basis for a guilty plea is adequate, the court may consider "all of the evidence before it at the time of judgment." *United States v. Lomow*, 266 F.2d 1013, 1017 (9th Cir. 2001).

B. The plea colloquy was adequate.

To convict a defendant of a violation of 18 U.S.C. § 371,

> the government must prove only that (1) the defendants entered into an agreement (2) to obstruct a lawful function of the IRS (3) by deceitful or dishonest means, and (4) at least one overt act was committed in furtherance of the conspiracy.

United States v. Poseley, Nos. 06-10446, 06-10462, 2008 WL 467695, at *1 (9th Cir. Feb. 20, 2008). *See also United States v. Caldwell*, 989 F.2d 1056, 1058 (9th Cir. 1993)(the government must show, among other things, that the defendant obstructed the operations of the Internal Revenue Service (IRS) by "deceit, craft or trickery, or at least by means that are dishonest."). The Ninth Circuit has not defined "deceitful" or "dishonest" in the context of § 371. In the jury instructions in this matter, the Court instructed the jury to give these terms their ordinary meaning.

Fuselier asserts the plea colloquy was not adequate

because the deceitful or dishonest means element of the charge was not addressed at the plea proceeding. As noted, however, the government's counsel announced the elements of the conspiracy charge, including the requirement that the conspiracy was "accomplished through deceitful or dishonest means," and the Court directed Fuselier to listen carefully to counsel's recitation of the legal elements as well as the factual bases and not to plead guilty if he had a problem with the elements or the facts.

The Court then asked Fuselier: "[D]o you understand the conspiracy charge as alleged against you in this 18-page Indictment? Do you have it in mind, or do you need me to read it to you?" Fuselier responded he "had it in mind" and did not need the Court to read the Indictment to him. As noted, the Indictment correctly pleaded the stated offense as follows:

> Beginning in or about June 2002 and continuing up to and including the present, in the District of Oregon, and elsewhere, defendants JOSEPH OQUENDO SALADINO, RICHARD ALLEN FUSELIER, MARCEL ROY BENDSHADLER, MICHAEL SEAN MUNGOVAN (A.K.A. CAJUN MIKE), and RICHARD J. ORTT, and others known and unknown to the grand jury, unlawfully and knowingly combined, conspired, confederated, and agreed together to defraud the United States *by deceitful and dishonest means* by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service, an agency of the United States, in the ascertainment, computation, assessment and collection of revenue, that is, federal individual income taxes.

Indictment at ¶ 18 (emphasis added).

Thus, although the Court did not specifically reiterate the deceitful or dishonest means element in its discussion with Fuselier, that element was included in the Indictment and in the government's recitation. Moreover, Fuselier confirmed he had the charge in mind and did not need the Court to read it to him before proceeding.

In addition, the Court inquired of Fuselier as to whether the information in subparagraphs a-e of paragraph 25 of the Plea Petition was true, and Defendant agreed it was. As noted, in paragraphs b, c, and e, Defendant agreed

> b. The returns and amended returns we filed on behalf of these clients accurately stated the clients' gross income, but asserted the theory that income earned from non-commercial activity (including personal labor or services) did not constitute taxable income.
>
> c. Many of the returns that we filed for these taxpayers were frivolous in that they were filed for the sole purpose of delaying the criminal enforcement actions against the taxpayers, but before we had any reason to believe that the claim was legally valid.
>
> * * *
>
> e. Accordingly, we did conspire to defraud the United States by impeding, impairing, obstructing or defeating the lawful functions of the Internal Revenue Service of the Department of the Treasury and committed at least one overt act in furtherance of that conspiracy.

Finally, when the government set out the factual bases for the charge at the plea proceeding, it specifically asserted

Fuselier assisted individuals to "claim false tax reductions," "prepared and caused to be prepared fraudulent tax returns using the claim-of-right program," and received "various frivolous filing letters that Mr. Saladino's clients would receive from the IRS after filing tax returns using the claim-of-right program."

Against this background, the Court notes Fuselier has not provided any testimony in support of his Motion that explains his thought processes at the time of his plea and specifically has not testified he did not understand at the time of his plea that deceitful or dishonest means was an element of the charge. Thus, on this record, the Court does not know at this stage what inferences to draw from Fuselier's trial testimony that potentially negate the deceitful or dishonest means element of the offense. The Court notes there are other explanations why Fuselier's trial testimony might reflect an inconsistency with his plea proceeding: Perhaps Fuselier had a change of heart regarding his plea or perhaps he was reluctant, once on the witness stand, to fully cooperate with the government against his co-defendants. Although the Court will defer resolution of that question to the sentencing hearing, the Court is unpersuaded by this record that Fuselier failed to understand or to appreciate that deceitful or dishonest means was a material element of the crime to which he pled guilty.

Accordingly, the Court concludes Fuselier has not

established the plea colloquy was inadequate or that he pled guilty without understanding the nature of the charge or without realizing his conduct actually fell within the elements of the charge.

C. There was a sufficient factual basis for Fuselier's guilty plea.

Fuselier also contends there was not a sufficient factual basis for his guilty plea. As noted, Federal Rule of Criminal Procedure 11 requires the Court to determine that a plea has a factual basis. When considering whether a factual basis for a guilty plea is adequate, the Court may consider "all of the evidence before it at the time of judgment." *Lomow*, 266 F.2d at 1017.

As noted, to convict a defendant of violating 18 U.S.C. § 371,

> the government must prove only that (1) the defendants entered into an agreement (2) to obstruct a lawful function of the IRS (3) by deceitful or dishonest means, and (4) at least one overt act was committed in furtherance of the conspiracy. *See United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993).

Poseley, 2008 WL 467695, at *1.

At trial Fuselier testified he, among other things, (1) asserted in tax returns filed with the IRS that compensation for personal services was not taxable and took a full deduction for those amounts on behalf of his clients; (2) received disallowance notices from the IRS regarding those deductions; (3) received the

Ledford and *Clark* decisions and understood those courts concluded the federal tax code clearly provides that income from personal services is taxable; (4) continued to assert income from personal services is not taxable in tax returns and in litigation before the Federal Court of Claims despite warnings from various courts; (5) received between 2001 and 2005 court opinions and frivolous-filing letters from the IRS denying the claim-of-right theory and indicating there was not any basis in law for the assertion that compensation for personal services was not taxable; and (6) without disclosing to his clients adverse decisions like *Ledford* and *Clark*, continued to advise and to assert on behalf of his clients that compensation for personal services was not taxable despite these opinions and notices.

The government contends this evidence is sufficient to establish that a factual basis exists to conclude Fuselier acted with dishonest or deceitful means and relies on *United States v. Tuohey*, 867 F.2d 534 (9th Cir. 1989), to support its contention. In *Tuohey* the defendant

> conspired with other individuals to gain control of the Bank of Northern California without reporting the transaction to the Federal Deposit Insurance Corporation ("FDIC"). Although the conspirators planned to hold 51 percent of the shares as a group, they purchased the stock as individuals, each conspirator purchasing fewer than ten percent of the shares. They thus evaded the reporting requirements applicable to changes in control of federally insured banks.

Id. at 535. The defendant pled guilty to one count of Conspiracy

to Defraud in violation of 18 U.S.C. § 371. *Id.* at 536. The Ninth Circuit affirmed the defendant's conviction and noted the meaning of the term "defraud" in § 371 is broader than its meaning at common law. The Ninth Circuit concluded "the defendants willfully conspired to avoid a reporting requirement imposed by statute. Their evasion of their duty certainly impaired the proper regulatory function of the FDIC. A reasonable trier of fact could conclude that this conduct constituted a fraud upon the government." *Id.* at 538. In *Caldwell* the Ninth Circuit noted *Tuohey* did not "mention[] the dishonest means requirement" of § 371. The *Tuohey* court, however, did not "have to decide whether section 371 reached conspiracies to obstruct the government in ways that were neither deceitful nor dishonest" because that case "involved deceitful and dishonest conduct." *Caldwell*, 989 F.2d at 1059 n.3.

This case clearly involved conduct that went well beyond repeated and obstinate, open and public efforts to interfere with the lawful function of the IRS in ascertaining and collecting taxes owed on the wages and self-employment income of Defendant's clients. At the least, by the time Fuselier and his convicted co-defendants acquired actual knowledge of the *Ledford* and *Clark* decisions adverse to their own clients's interests and, nonetheless, chose to continue to market their programs without disclosing these adverse rulings to those clients, their conduct

was, in fact, "deceitful or dishonest" as those terms are ordinarily understood.

On this record, the Court concludes there was an adequate factual basis to support the deceitful or dishonest means element of the offense of conviction.

III. Legal Innocence

Fuselier also moves to withdraw his plea on the ground that his testimony at trial demonstrates a claim of legal innocence. Fuselier relies on two cases to support his claim of legal innocence: *United States v. Garcia*, 401 F.3d 1008 (9th Cir. 2005), and *Oretega-Ascanio*, 376 F.3d 879 (9th Cir. 2004). The government asserts Defendant has not provided any new facts, witnesses, or changes in the law between his plea and sentencing to support his claim of actual innocence. The government also contends *Garcia* and *Oretega-Ascanio* are distinguishable.

In *Garcia* the defendant pled guilty to manufacturing methamphetamine and possession of a firearm. After entry of the plea and before sentencing, however, the defendant located a new witness who submitted an affidavit that significantly contradicted the government's witness. *Id.* at 1012. The district court denied the defendant's motion to withdraw his plea, but the Ninth Circuit reversed on the ground that the discovery of new evidence that directly contradicted the government's case was a fair and just reason for withdrawal. *Id.*

Fuselier has not presented any such new evidence.

In *Oretega-Ascanio*, following the entry of the defendant's plea and before sentencing, the Supreme Court issued a decision that overruled prior Ninth Circuit law and permitted certain defendants to challenge their underlying deportation. 376 F.3d at 881-82. The district court denied the defendant's motion to withdraw his plea, and the Ninth Circuit reversed on the ground that the district court had "applied the wrong legal standard to [the defendant's] motion" due to the change in the law, and, therefore, the district court abused its discretion when it denied the defendant's motion. Fuselier has not pointed to any intervening change in the law.

On this record, and in the exercise of the Court's discretion, the Court concludes Fuselier has not established he is factually or legally innocent. Accordingly, the Court denies Fuselier's Motion to Withdraw on the basis of actual innocence.

IV. There was not a "fatal variance" between the crime charged in the Indictment and the crime to which Fuselier pled guilty.

Fuselier moves to withdraw his guilty plea on the ground that "the essential correlation between the crime alleged in the indictment and the offense to which the defendant pled guilty was absent." Specifically, Fuselier asserts the Indictment alleged a conspiracy between Fuselier and the FPC, but the conspiracy that formed the basis of Fuselier's plea was his agreement with Ortt

to operate Compensation Consultants. In addition, according to Fuselier, the Indictment alleged the object of the conspiracy was to impede, impair, obstruct, and defeat the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue. According to Fuselier, however, the sole object of the conspiracy to which he pled was to "delay the criminal enforcement actions against the taxpayers . . . who were being threatened with criminal enforcement and prosecution for failure to file."

Fuselier relies on *United States v. Mastrapa*, 509 F.3d 652 (4th Cir. 2007), to support his assertion that the Court should allow him to withdraw his plea because there was a "fatal variance" between the crime charged in the Indictment and the crime to which Fuselier pled. In *Mastrapa*, the defendant pled guilty to Conspiracy to Distribute 500 Grams or More of Methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1). The defendant admitted at the plea proceeding that he "had agreed to give two men a ride and help carry their grocery bags but that he did not know them or what they were doing." *Id.* at 654. At the plea colloquy, the defendant "refused, despite questioning by the district court, to admit to the factual basis necessary to support the charges against him." *Id.* at 654-55. Nevertheless, the court accepted the defendant's guilty plea relying on the affidavit of a Drug Enforcement Agency (DEA) Agent who testified

he observed the defendant drive his vehicle to the hotel where the DEA Agent would ultimately make an undercover purchase of methamphetamine from Dany Medina-Lovos and Fidel Chicas-Hernandez. *Id.* at 655. The DEA Agent further testified he observed the defendant assist Chicas-Hernandez in carrying grocery bags, which turned out to contain five pounds of methamphetamine, into a hotel room. The DEA Agent did not testify further as to the defendant's involvement in the conspiracy or as to his knowledge of the true nature of the transaction. *Id.* at 656. The Fourth Circuit vacated the defendant's plea and remanded the matter to the district court on the grounds that the defendant did not admit the necessary *mens rea* and the record did not contain a sufficient factual basis to support the elements of the offense. *Id.* at 655.

Here the government recited the following facts as evidence against Fuselier, and Fuselier accepted them at the plea proceeding:

> Mr. Fuselier first had contact with Mr. Saladino in mid-2002, and that Mr. Saladino traveled to New Orleans and met with Mr. Fuselier and Mr. Ortt to discuss the claim-of-right program. The Government would show that Mr. Fuselier provided the claim-of-right program to Mr. Saladino with knowledge that he would use it, although they may have differed on the marketing approach as to how to use it.
>
> The Government would show that Mr. Saladino turned to Mr. Fuselier periodically for advice and counsel about the substance of the claim-of-right program and certain issues related to the

implementation and marketing of the claim-of-right program.

The Government would show that Mr. Saladino would forward to Mr. Fuselier various frivolous filing letters that Mr. Saladino's clients would receive from the IRS after filing tax returns using the claim-of-right program.

The Government would show that Mr. Saladino was a source of clients for Mr. Fuselier, who would refer people to - Mr. Saladino would refer individuals to Mr. Fuselier who were threatened with criminal prosecution and had various problems with the IRS.

The Government would show that Mr. Fuselier trained defendants and I'm just going to focus on two here -- the several nonlawyers, who were called litigators, to work with Mr. Saladino in filing claims against the IRS in court. And in fact Mr. Saladino paid for that training, made those payments to Mr. Fuselier.

The Government would show that Mr. Fuselier also paid for other services he provided, and that we have records showing at least 11 payments, ranging from 200 dollars to 500 dollars during the period September 24th of 2002, through May 5th of 2003.

The Government-would show that Mr. Saladino and Mr. Fuselier discussed various court cases, and that Mr. Saladino would, from time to time, send litigation paperwork to Mr. Fuselier for his review. The Government would show that Mr. Fuselier would send his news newsletter to Mr. Saladino, and would instruct him on the law.

And the Government would show that Mr. Saladino discussed with Mr. Fuselier various court cases, like the *Ledford* decision and the Gary Clark Oregon tax court case.

* * *

The Government would show that the Internet was used as a means of payment, and that Mr. Saladino would instruct people to pay with blank money

> orders, and that Mr. Saladino paid Mr. Fuselier through the Internet and the EVO cash manner of payment.

Blackman Decl., Ex. 2 at 32-36. In addition, prior to the recitation of facts, the government advised Fuselier that the elements of the crime included the intent to defraud the United States by obstructing, impeding, impairing, and defeating the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of revenue (namely, federal income taxes) through deceitful or dishonest means. Fuselier did not object to the elements or contend his conduct did not satisfy the elements at any time during the plea proceeding.

Finally, Fuselier's trial testimony reflects: (1) in June 2002 he met with co-defendants Saladino and Ortt; (2) following that meeting, he agreed to assist Saladino and FPC implement the claim-of-right program, including preparing tax returns and supporting litigation; (3) Saladino agreed to share with Fuselier the responses from FPC's customers; (4) Fuselier knew and understood FPC had a multi-level marketing plan that included the claim-of-right program; (5) he provided ongoing assistance to FPC in its implementation of the claim-of-right program, including tax returns and litigation support; (6) he was paid for his advice and ongoing support of FPC; (7) he shared clients with FPC; (8) he attended some of FPC's litigation marketing conference calls and was available to answer questions from FPC's

clients; and (9) he trained "litigators" for FPC to use in its operations.

In contrast to the defendant in *Mastrapa*, the facts to which Fuselier pled at the plea proceeding as well as the evidence he provided at trial establish he conspired to impede, impair, obstruct, and defeat the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue and that he did so through deceitful or dishonest means.

On this record, and in the exercise of its discretion, the Court concludes Fuselier has not established there was a "fatal variance" between the crime charged in the Indictment and the crime pled to by Fuselier. Accordingly, the Court denies Fuselier's Motion to Withdraw on that basis.

CONCLUSION

For these reasons, the Court **DENIES** Fuselier's Motion (#364) to Withdraw Plea of Guilty.

The Court also requests Messrs. Kauffman and Blackman to confer with their client to determine which of the two lawyers will continue to represent Fuselier through sentencing as it is no longer necessary for both counsel to be representing him. The Court **DIRECTS** counsel to file, no later than **May 4, 2010**, a

notice resolving this question.

IT IS SO ORDERED.

DATED this 20th day of April, 2010.

ANNA J. BROWN
United States District